STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 3, 2005
v	No. 255536 Oakland Circuit Court
THOMAS CHRISTOPHER DITTRICH, Defendant-Appellant.	LC No. 2003-190192-FH

Before: Fitzgerald, P.J., and Cooper and Kelly, JJ.

PER CURIAM.

Defendant Thomas Christopher Dittrich appeals as of right his convictions of six counts of third-degree criminal sexual conduct (CSC)[1] and one count of fourth-degree CSC.[2] He was sentenced to 95 months to 15 years' imprisonment for each third-degree CSC conviction and one to two years' imprisonment for his fourth-degree CSC conviction. We affirm.

I. Background Facts

Defendant's convictions arose from a three-month sexual relationship with his daughter's thirteen-year-old classmate. In 2002, defendant lived with his wife and two teenaged daughters in a large home in Davisburg. The complainant, as well as other friends of the Dittrich children, often spent weekend nights in the family's home. The complainant also spent several weekday nights with the family. While staying at defendant's home, the complainant would sleep on a couch in the room adjacent to the master bedroom, rather than upstairs with defendant's daughters. Several witnesses testified that defendant and the complainant were frequently left alone together in the house. The family owned several horses. The complainant and defendant would frequently stay home while the others went riding.

The complainant alleged that the various instances of sexual assault occurred at night while she slept alone on the couch or while everyone was riding. During October and November of 2002, defendant frequently engaged in sexual acts with the complainant, including digital

[1] MCL 750.520d(1)(a) (penetration of a 13-year-old victim).

[2] MCL 750.520e(1)(a) (sexual contact with a 13-year-old victim).

penetration and oral sex. The complainant alleged that she performed oral sex upon defendant and the two had intercourse for the first time over Thanksgiving weekend. The complainant testified that, in December, she and defendant once engaged in sexual acts at her home while her mother was gone.[3] The complainant testified that she and defendant had intercourse six or seven times, and that she performed oral sex on defendant several times.

The complainant testified that she was in love with defendant, and believed that he was in love with her.[4] She testified that defendant promised to divorce his wife, marry her, sell his business, and move with her to Florida. She also testified that defendant bought her expensive presents, gave her money, and promised to buy her family a new home and cars. Defendant also gave the complainant sexually explicit materials.[5] The complainant was also able to describe a bump on defendant's penis that was consistent with his wife's testimony.

According to the testimony of defendant's wife, daughter, and another frequent house guest, defendant's conduct with the complainant was immediately suspicious. In October of 2002, defendant's wife phoned him and asked him to assist with a horse that had broken loose. Defendant took more than an hour to make the ten-minute drive to his wife's location and brought the complainant, who had left the Dittrich house earlier, with him. On another occasion, defendant would not allow his daughter to accompany him when he drove the complainant home and went to pick up a pizza. He was gone for three hours. Defendant and the complainant were also observed drinking alcohol together, looking at pornography on a computer, and drawing pornographic pictures. Both defendant's wife and daughter testified that they once saw defendant and the complainant "spooning" on the couch and were unable to separate the two.

In December of 2002, the complainant told her adult sister, Nicole, that she was in love with defendant, and that he had given her alcohol and offered her Ecstasy. The complainant admitted to Nicole that she had a sexual relationship with defendant; however, she denied it when confronted by her parents. The complainant subsequently attended the Dittrich's Christmas party. Nicole went to the Dittrich house and forced the complainant to leave with her. The complainant then told her parents about the sexual assaults. When confronted by his wife, defendant initially denied the allegations, but subsequently admitted to having a sexual relationship with the complainant. In late December, defendant called the complainant at school, warning her not to tell anyone and threatening to kill himself if anyone found out about their

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[3] On that occasion, defendant drove the complainant home to help her mother who had locked herself out of the home. Her mother watched the two drive away and then left the house herself. The complainant testified that she and defendant returned to have intercourse and oral sex before returning to defendant's house. Although defendant had not entered the house in her presence, the complainant's mother later found defendant's jacket inside.

[4] Defendant told his daughter that the complainant was going to be her new mother. Defendant also told one of the complainant's friends that he was in love with her and that the complainant was very special to him.

[5] Defendant's wife testified that many of these items were identical to items missing from her bedroom.

relationship.[6] The complainant explained to defendant that she had already told two of her friends about the relationship. In turn, these individuals testified that defendant threatened to hurt them if they told anyone else.

II. Effective Assistance of Counsel/Other Acts Evidence

Defendant argues that defense counsel was ineffective for failing to object to, and for actually eliciting, highly prejudicial, irrelevant, and inadmissible "other acts" evidence of his alleged physical and verbal abuse of his wife and daughters. As defendant failed to raise this issue in the trial court in connection with a motion for a new trial or a *Ginther*[7] hearing, our review is limited to plain error on the existing record affecting defendant's substantial rights.[8] Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.[9] To establish ineffective assistance of counsel, a defendant must show that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's error, the result of the proceedings would have been different.[10] A defendant must also overcome the presumption that counsel's performance was sound trial strategy.[11]

Evidence of other bad acts is inadmissible to prove an individual's propensity to act in conformity therewith.[12] But such evidence may be admissible to show "proof of motive, opportunity, intent, preparation, scheme, plan or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material . . . ."[13] We evaluate the admission of other acts evidence by considering if: (1) it was offered for a proper purpose under MRE 404(b); (2) it was relevant; (3) its probative value was not substantially outweighed by unfair prejudice; and (4) a limiting instruction was requested and provided by the trial court.[14]

During defendant's trial, defense counsel and the prosecution both elicited testimony regarding the Dittrich family's tumultuous home life, including specific acts of violence. The prosecution contended that this evidence was necessary to explain how defendant was able to

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[6] Defendant actually left a message with the school secretary asking the complainant to call him. When the complainant returned the call, she spoke quietly to defendant for ten to fifteen minutes with her back to the secretary and ignored repeated orders to end the call.

[7] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[8] *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

[9] *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Rockey*, 237 Mich App 74,76; 601 NW2d 887 (1999).

[10] *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2004).

[11] *Id.* at 600.

[12] MRE 404(b)(1); *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

[13] MRE 404(b)(1).

[14] *People v VanderVliet*, 444 Mich 52, 55, 63-64, 74-75; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994); see also *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000).

maintain a relationship with a young girl in his family's home. Defense counsel argued that this evidence revealed that defendant's family had motive to falsely incriminate him.

We first note that this was not a close case and, therefore, any error in admitting this evidence was harmless. The complainant gave detailed testimony regarding her affair with defendant. Defendant's wife and daughter described the suspicious and inappropriate conduct they daily observed between defendant and the complainant. Defendant's wife even testified that he admitted to the relationship. Furthermore, several other witness—including the complainant's friends and family, another frequent guest at the Dittrich home, and the school secretary—testified about incidents causing them to question the nature of defendant's relationship with the complainant.

We would be remiss, however, if we did not express our concern over the use of this character evidence. In most instances, the evidence of domestic violence was far more prejudicial than probative.[15] Defendant never sexually abused his own children or any other minor house guest. The only purpose this evidence served was to portray defendant as a man of bad character predisposed to do bad deeds. Despite the highly prejudicial nature of this evidence, defense counsel repeatedly failed to object to its admission, and actually used the evidence himself in an attempt to establish that defendant's family was biased against him. Given the tendency of the jury to give excessive weight to such improper character evidence, we cannot presume that this was sound trial strategy.[16]

III. Evidence of Prior Sexual Contact

Defendant contends that the trial court violated his right to confrontation by denying his motions seeking to introduce evidence of the complainant's sexual history to establish an alternate source of her ruptured hymen. The trial court denied defendant's initial pretrial motion, but did allow defendant to elicit testimony regarding the complainant's preexisting knowledge of sexual terminology. Defendant unsuccessfully renewed his motion at trial based on the testimony of a prosecution witness, Dr. Rita Sabbath,[17] and the complainant's alleged indication that she had prior sexual contact with a young man named "Mitchell."

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[15] In fact, only one incident of violence in the home was related to the complainant in any way.

[16] See *Crawford*, supra at 384, quoting *Old Chief v United States*, 519 US 172, 181; 117 S Ct 644; 136 L Ed 2d 574 (1997), and *Michelson v United States*, 335 US 469, 476; 69 S Ct 213; 93 L Ed 168 (1948):

> [T]he problem with character evidence generally and prior bad acts evidence in particular is not that it is irrelevant, but, to the contrary, that using bad acts evidence can "'weigh too much with the jury and . . . so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.'"

[17] Dr. Sabbath is also referred to as "Dr. Sabbagh" in portions of the lower court record.

Dr. Sabbath testified that she performed a pelvic examination on the complainant on December 27, 2002. Dr. Sabbath concluded that the complainant's "hymen was not intact," or was ruptured. She testified that the rupture could have been caused by intercourse or by the insertion of a tampon or other object into the vagina. Dr. Sabbath also indicated that penetration by one finger could not rupture a hymen, but that the insertion of multiple fingers could potentially cause a rupture. It was defense counsel's theory that the complainant admitted that she had been digitally penetrated by Mitchell and, therefore, he should be allowed to question her further to ascertain the actual source of her ruptured hymen. However, defense counsel did not indicate to whom the complainant made this admission. Furthermore, there was no testimony from anyone that the complainant had engaged in any prior sexual contacts to substantiate defense counsel's claim.

We review a trial court's decision to preclude evidence under the rape-shield statute[18] for an abuse of discretion.[19] "In exercising its discretion, the trial court should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation."[20] While evidence of specific instances of a complainant's past sexual conduct with others is generally irrelevant and inadmissible,[21] "once the prosecution introduce[s] medical evidence to establish penetration, evidence of alternative sources of penetration [becomes] highly relevant to material issues in dispute."[22] However, "[t]he defendant is obligated initially to make an offer of proof as to the proposed evidence and to demonstrate its relevance to the purpose for which it is sought to be admitted."[23] The trial court properly denied defendant's motions, as he failed to make a credible offer of proof that a third party could be responsible for the complainant's ruptured hymen.

IV. Prior Consistent Statement

Defendant finally argues that the trial court improperly admitted portions of the complainant's second statement to the police as prior consistent statements under MRE 801(d)(1)(B). He contends that these statements were not properly used to rebut a charge of

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[18] MCL 750.520j. Pursuant to that statute, evidence of a complainant's prior sexual conduct is only admissible if "material to a fact at issue in the case" and only to the extent that "its inflammatory or prejudicial nature does not outweigh its probative value . . . ." MCL 750, 520j(1).

[19] *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996); *People v Hackett*, 421 Mich 338, 349; 365 NW2d 120 (1984).

[20] *Adair*, *supra*, quoting *Hackett*, *supra*.

[21] See *Hackett*, *supra* at 347-348; *People v Arenda*, 416 Mich 1, 10; 330 NW2d 814 (1982).

[22] *People v Haley*, 153 Mich App 400, 404-405; 395 NW2d 60 (1986).

[23] *Hackett*, *supra* at 350.

recent fabrication and, therefore, were inadmissible hearsay. We review a trial court's decision to admit evidence for an abuse of discretion.[24]

At trial, the complainant testified on redirect that defendant would get up in the middle of the night to perform oral sex on her. On recross, defense counsel asked her why she did not initially tell the police, or testify at the preliminary examination, regarding this fact. The complainant conceded that she had not testified to this fact until asked on redirect. The prosecutor then showed the complainant several portions of her second statement to the police in which she indicated that she and defendant engaged in sexual acts at night while the others were sleeping.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted."[25] A witness's prior statement is not hearsay, however, if "the declarant testifies at the trial and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Defense counsel implied that the complainant had lied on redirect examination, as she had not previously told the authorities that defendant had performed oral sex on her late at night. This charge of recent fabrication was properly rebutted with the complainant's statements to the police made several months before trial. Accordingly, the trial court did not err in admitting this evidence.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jessica R. Cooper
/s/ Kirsten Frank Kelly

[24] *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001).

[25] MRE 801(c).